

# **MONTANA PUBLIC DEFENDER COMMISSION**

## **MINUTES**

**Office of the State Public Defender – Central Office**

**Butte, Montana**

**DECEMBER 6, 2006**

*(Approved at the January 26, 2007 Commission Meeting)*

### **Call to Order**

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:45 a.m.

### **Commissioners Present**

Betty Bichsel, Edgar; Stephen Nardi, Kalispell; Jennifer Hensley, Butte; Doug Kaercher, Havre; Mike Sherwood, Missoula; Caroline Fleming, Miles City; Tara Veazey, Helena; and James Park Taylor, Missoula

### **Commissioners Absent**

Dan Donovan, Great Falls; Wendy Holton, Helena; and Ivan Small, Poplar

### **Other Interested Parties**

Scott Crichton, Executive Director, American Civil Liberties Union (ACLU); Robin Rowe, American Federation of State, County and Municipal Employees (AFSCME); Kerry Newcomer, Office of the State Public Defender (OPD) Conflict Coordinator

### **Approval of Minutes from the October 13, 2006 Meeting**

Commissioner Nardi moved to approve the minutes as submitted. Commissioner Hensley seconded the motion. The motion carried.

### **Reports**

#### *Conflict Coordinator Report (Kerry Newcomer)*

Mr. Newcomer recapped his work as the Conflict Coordinator over the last five months (exhibit 1). Part of his work included reviewing the design of conflict systems in other states, including Colorado, Iowa and Georgia. Based on his research and personal experience, Mr. Newcomer presented three options for conflict administration for the Commission's consideration. He sees oversight separation as the crux of the problem, but the solution is not clear cut in any of the three scenarios.

#### *Chief Public Defender Report (Chief Randi Hood except as noted)*

- *Training Coordinator Update (Eric Olson)*

Mr. Olson reviewed the training programs that have been conducted by OPD since July. They are included in the draft Report to the Governor, Legislature and Supreme Court (exhibit 2). Mr. Olson said that the VisionNet presentations have been very effective, and there are a number scheduled through the spring. Many training sessions have been filmed, and they will be available on video from the training library.

Chairman Taylor would like to see the training sessions available on demand by streaming video. Commissioner Veazey suggested contacting the State Bar since they already have a mechanism in place for delivering CLEs on line as well charging for them.

There was discussion regarding how to market effectively to contract attorneys, adjusting the pay scale for contract attorneys who attend our trainings, encouraging contract attorneys to take CLEs appropriate to the type of public defender work they are doing, and future training topics. Training suggestions included cross-training with Montana Legal Services Association on civil legal problems (such as immigration and housing) that often impact people with criminal issues.

- *Public Defender System Update*

Chief Randi Hood reported that the Kalispell, Butte, Helena Regional and Polson offices have all moved or are preparing to move into their permanent office locations. Kalispell continues to experience a significant increase in caseload, and they have added one new attorney with two more starting January 1. A position has been added in Region 5 to handle the institutional demands (prison and Montana State Hospital) in that region. Billings still has two vacancies. In the Appellate office, their half-time person will work more than half-time but less than full time, so they are considered to be fully staffed (exhibit 3).

Commission members discussed an article regarding services in Kalispell that appeared in the *Missoula Independent*, and agreed that no response to the article was required.

Chief Hood, Regional Deputy Public Defender Ed Sheehy and Hamilton Managing Attorney Dave Stenerson met with Judge Haynes and Judge Langton to discuss the issues raised in Judge Haynes' letter to Senator McGee (exhibit 4). Chief Hood hopes to meet with Senator McGee soon.

Human Resource Officer Barb Kain did some research in response to questions regarding public defender salaries compared to those of prosecuting attorneys. Ms. Kain found that they are generally comparable, with OPD entry level salaries approximately \$200 higher than those for beginning prosecutors. However, at the high end, county attorneys make considerably more than our managing attorneys. Commissioner Veazey noted that the general perception that OPD salaries are too high extends to the non-profit sector as well. Chief Hood has asked to address the Executive Board of the Montana County Attorneys Association (MCAA) to clarify any misinformation they may have regarding our pay plan.

Dr. Laura Wendlandt has been hired as our Mental Health Consultant. Her role will include training staff to define the kinds of evaluations needed for particular cases and to ensure that they are asking for and receiving appropriate levels of service, and to develop a list of service providers throughout the state including cost guidelines. The goal is to provide better services more cost-effectively. Dr. Wendlandt will be housed in the Missoula office and will be supervised by Eric Olson.

- *Legislative Update*

The Legislative Finance Committee met in November to discuss the OPD supplemental. They were satisfied with the sequence of events that Administrative Director Harry Freebourn provided (exhibit 5) and approved the increase in FTEs called for in the strategic plan.

Representative Margaret Campbell will sponsor the electronic recording of custodial questioning bill. Sponsors for our other three bills will be identified once committee assignments have been made. The bill tracking system has been set up, and Chief Hood will begin reviewing bills next week. The OPD budget will be heard by the General Government and Transportation Appropriations Subcommittee.

State agencies are required to track lobbying expenses, including staff salaries expended on lobbying. Expenditures in excess of \$2300 require the agency to register. Elected officials are exempt from lobbying requirements. Commissioner Sherwood noted that membership dues paid by the counties to the MCAA help fund a paid lobbyist. There was discussion regarding the possibility of OPD paying employees' dues to the Montana Association of Criminal Defense Lawyers (MTACDL). The increased membership would provide MTACDL with additional funding which they might choose to spend on a paid lobbyist. Membership dues are expected to be part of the collective bargaining negotiations.

- *Commission Report—47-1-105(9)*

The Report to the Governor, Legislature and Supreme Court (exhibit 2) is required by statute and must be finalized prior to the Legislature convening in January.

Mr. Freebourn clarified that the staffing report reflects number of individual staff, not full-time equivalent (FTE) staff, as required by statute. Information regarding FTE will be available for anyone requesting that additional information. Mr. Freebourn also noted that the last page of the report is just a sample format for the Commission's approval. The actual data will be ready for publication prior to the start of the legislative session.

There was a discussion regarding the possibility of charging contract attorneys fees for attending OPD training presentations. Mr. Freebourn does not believe there is a way for OPD to do this, but he agreed to do some research.

Commissioners suggested changes to the Indigency Policy and the Training Report. Commissioner Hensley moved to approve the Report to the Governor, Legislature and Supreme Court as amended. Commissioner Fleming seconded. Motion carried.

### **Report from the Legislative Audit Division (Jennifer Erdahl)**

Jennifer Erdahl from the Legislative Audit Division distributed copies of their Financial-Compliance Audit of the Office of the State Public Defender for the fiscal year ended June 30, 2006 (exhibit 6). This was a routine audit, required by state law every two years. The report contained an unqualified opinion on the financial schedules and had no recommendations to the office, which is the best possible result. Commissioner Sherwood congratulated Mr. Freebourn and his staff for the excellent report. Mr. Freebourn thanked Ms. Erdahl and her staff for their efficient work.

Ms. Erdahl offered to investigate the possibility of accepting training fees as donations. She also answered a question regarding the audit trail for the Conflict Coordinator documentation. Ms. Erdahl said that backup documentation doesn't necessarily need to be in the Central Office, as long as it is available somewhere.

### **Reports, Continued**

- *Regional Community Advisory Councils*  
Chief Hood reported that Governor Schweitzer is trying to reduce the number of advisory councils statewide and so he did not approve the creation of Public Defender Regional Advisory Councils (exhibit 7).
- *IT Update, GANT Chart and Case Management System (Harry Freebourn)*  
Mr. Freebourn reviewed the GANT chart (exhibit 8). A separate GANT chart is being developed for tasks related to implementation of the case management system. The temporary case management system is JustWare, which some of the counties were using. Hopefully, funding for the permanent system will be obligated before fiscal year end. IT is now fully staffed with four LAN support staff located throughout the state.
- *Native Court Worker*  
Regional Deputy Public Defender Kristina Neal and Native Court Worker Myrna Kuka joined the meeting by teleconference from Great Falls. Ms. Kuka has been well received since she began work in August. She acts as a liaison to the Native American community, helping to locate witnesses, working on alternative sentencing and visiting the regional prison. She has worked with approximately 18 clients, with only one case closed so far. Ms. Kuka is extremely busy with that size caseload, and thinks that another worker could also keep busy in her region with the number of Native Americans in the prison system. She would expect similar good results if the program could be expanded to other regions.

### **Public Comment**

Scott Crichton, Executive Director of the ACLU, said that the ACLU staff also discussed the article that appeared in the *Missoula Independent*. Mr. Crichton was unhappy about being misquoted in the article, but they did not write a response.

Mr. Crichton agreed with Commissioner Sherwood that a collective voice is needed in the legislative process. He wanted the Commission to be aware of other criminal justice reforms that are being discussed by the Corrections Advisory Council, including expanding community-based services, modifying drug courts, and increased counseling for sex offenders and chemically dependent offenders.

### **Reports, Continued**

- *Financial Results/Budget Update (Budget Committee and Harry Freebourn)*  
Commissioner Kaercher, chair of the Budget Committee, presented the financial report (exhibit 9) through November 30. He said that the Committee is keeping an eye on operating expenses and expects that the trend for contract services should start to reverse in the next month or so. They are not yet ready to change the supplemental request. Program 2, the Appellate program, has totally expended its operating budget for the year, primarily due to a death penalty case that accounted for \$60,000 in contracted services.

The Governor's budget (exhibit 10) funds all but \$1.7 million of our request in FY 08 and all but \$1.5 million in FY 09. It does not include funding for fitness to proceed costs or an increase in contract attorney fees. Commissioner Kaercher and Chairman Taylor had a good meeting with Budget Director David Ewer.

Commissioner Kaercher said that Budget Committee meetings are to be held as public meetings from now on.

- *Contract Officer Update (Larry Murphy)*  
Mr. Murphy described in detail how incoming bills are processed, beginning with logging, review, final approval, and submission to accounts payable. He has implemented a process for notifying attorneys when their bills are being questioned. Mr. Murphy noted that he doesn't have any specific information about a case, but looks for questionable billing practices such as always billing the same amount of time for a specific task or billing at the attorney rate of \$60 per hour for administrative or paralegal tasks. He is developing a process for billing paralegal time at a reduced rate.

There is a new area on the OPD website dedicated to contract attorneys called "Contract Attorneys Corner." It will be updated regularly; the "Top Ten Tips for Contract Attorneys" (exhibit 11) is the first new posting.

The \$25 stipend for office costs has been an irritant to contractors who are losing money on postage, copies and telephone costs. Mr. Murphy presented two options to address the problem: 1) a graduated stipend based on number of cases per month; 2) payment of actual costs. Chairman Taylor would like to discuss the larger issue of how we pay contractors, including incentives and different rates for different tasks. He asked Commissioner Sherwood, Mr. Murphy and Mr. Newcomer to develop incentive-based hourly rates.

Contracted services for mental health evaluations have been a significant cost to date. Pre-approval for these services will now be done in consultation with Dr. Wendlandt. A protocol will be developed so that attorneys know exactly what services are needed in various circumstances so that they can request the proper level of services from the mental health professional.

- *Chief Appellate Defender Report (Jim Wheelis)*  
Chief Wheelis congratulated Chief Hood on recruiting Joslyn Hunt from the Attorney General's office. Ms. Hunt has been an incredible asset to the appellate office. Chief Wheelis also offered kudos to paralegal Sarah Braden for developing a procedure for transferring cases from the local offices to the appellate office. The appellate office currently has about 30 pending cases, meaning that briefs are due, out of a total of roughly 150 cases. Their caseload includes homicide, termination of parental rights, and record-based ineffective assistance of counsel.

**Office Policies: Pro Bono and Indigence**

Commissioner Nardi modeled the Pro Bono policy (exhibit 12) after the Governor's policy, except for expanded definitions under 2.1. The Indigency Policy (exhibit 13) has been revised to clarify both of the eligibility criteria for determination of indigence in section 3.2. Since these are office policies, they are Chief Hood's responsibility and no vote of the Commission is required for adoption.

**Visit from Senator Gallus**

Senator Steve Gallus stopped to say hello on behalf of the Butte delegation. He is interested in helping OPD with budget or policy issues during the legislative session.

**Conflict Coordinator Discussion**

Commissioner Nardi thanked Mr. Newcomer for doing a great job as the Conflict Coordinator, and for his research on possible long term solutions for conflict management.

The Commission engaged in a lengthy discussion including whether or not the Commission has statutory authority to hire and supervise a Conflict Coordinator, public perception of managing conflicts in-house versus through a contractor, the mechanics of administrative separation if brought in-house, and the ongoing question of how to handle multiple conflicts.

The Commission decided that the conflict management function should be brought in-house, to be managed by Larry Murphy. Criteria will be developed to firewall the pre-approval process, which is the major concern due to the case-strategy implications. The transition will be effective January 1, 2007 with Mr. Newcomer's assistance.

The Commission again thanked Mr. Newcomer for his impressive work on their behalf.

**Standards—General Discussion**

The Proposed Revisions to the Standards (exhibit 14) consists primarily of formatting and punctuation corrections, and has no substantive changes from the current version.

Two new standards are also proposed—Proficiency Determination for Contract Attorneys (exhibit 15) and Performance Evaluations (exhibit 16). In addition, the Standards will need to be amended to eliminate the Conflict Coordinator position and to reflect the new conflict management system. Chief Hood will draft the new standard.

Chairman Taylor appointed Commissioner Nardi, Commissioner Holton, Commissioner Donovan and Chief Hood to a committee to develop a new caseload standard for the Commission's consideration at the February meeting. The standard should address active cases, rather than an annual number of cases, and can weight cases by type. Chairman Taylor also wants a mechanism to track the length of time cases remain open.

Chairman Taylor also expressed concern regarding compliance with statutory requirements regarding the contracting process. He requested a report regarding the contracting process at the January meeting. Commissioner Sherwood, Mr. Murphy and Mr. Newcomer were appointed to develop a competitive hourly rate system that includes elimination of the office cost stipend, development of a paralegal rate, contemplation of the WestLaw proposal (exhibit 17) and consideration of statutory requirements.

**Chief Public Defender Pay Adjustment**

The Commission is required to review the salary of the Chief Public Defender annually. Most state employees received a 4% cost of living increase. Commissioner Hensley moved to increase Chief Hood's salary by 4%. Commissioner Bichsel seconded. The motion carried unanimously.

**Public Comment**

Mr. Crichton emphasized the importance of tracking caseloads. He also wanted to share information regarding the Florida public defender system, which recently ran out of money. He will support adequate OPD funding from our legislature so that the Montana system doesn't find itself in similar circumstances in a few years.

**Old Business/New Business (\*Action Items)**

Commissioner Kaercher moved to approve the proposed changes to the standards, including the Performance Evaluation, Proficiency Determination and Conflict Management standards. Commissioner Bichsel seconded. Motion carried unanimously.

Chairman Taylor asked Chief Hood to retroactively approve hiring Mr. Newcomer and intern Rob Lavine, and to approve hiring a new intern, Jordan Kilby. Ms. Kilby will continue to work on the standards, including creating an index and a table of contents. Chief Hood approved. Chief Hood also approved any extension to Mr. Newcomer's contract that might be required to complete the conflict management transition.

The next Commission meeting will be held January 26, 2007 at the Montana Association of Counties office in Helena.

**Adjourn**

The meeting adjourned at approximately 4:10 p.m.

Exhibits 1 – 17 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>.